



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 30, 1995

Ms. Sandy Smith
Executive Director
Texas Board of Professional Land Surveying
7701 North Lamar, Suite 400
Austin, Texas 78752

OR95-312

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31553.

The requestor seeks all documents pertaining to the registration of a particular registered public land surveyor. The responsive documents include three references from the surveyor's application for registration containing information about his surveying experience. You claim that this information should be excepted from disclosure because its release would affect the privacy interests of the persons providing the reference information. You state that the form used in 1979, when the particular applicant applied, contained language stating that the information provided would be held confidential. Current forms contain similar language with the notation that the board will hold the information confidential "to the extent allowed by law." You imply that the information should be excepted from disclosure pursuant to section 552.101.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You note that section 16 of article 5282c, V.T.C.S., the Professional Land Surveying Practices Act, requires applicants to furnish three references from registered professional land surveyors having personal knowledge of the applicant's surveying experience. No statutory provision excepts this information from disclosure. To the contrary, section 11 requires the board to keep a record of its proceedings open to public inspection at all reasonable times including, among other things, a registration of all applicants for registration or licensure containing an applicant's qualifications and any reasons for rejection of an application.

Because there is no statutory authority to withhold the information under section 552.101, we consider whether the doctrines of common-law or constitutional privacy except the information from disclosure. Constitutional privacy consists of two interrelated types of privacy: 1) the right to make certain kinds of decisions independently and 2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 (1987) at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

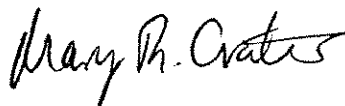
540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

We have reviewed the documents submitted for our consideration. Clearly, the references at issue here do not contain the kind of information excepted from disclosure by constitutional or common-law privacy. Additionally, the mere fact that a document contains a confidentiality clause is not sufficient to except the information from disclosure. A governmental body may not withhold information, including a settlement agreement or contract, simply because it has agreed to do so. Open Records Decision No. 444 (1986) at 6. A governmental body may rely on its promise of confidentiality to withhold information only if the governmental body has specific authority to make such a promise. Attorney General Opinion JM-672 (1987); Open Records Decision Nos.

514 (1988), 114 (1975).¹ The Texas Board of Professional Land Surveying is not expressly authorized by statute to agree to keep references submitted pursuant to section 16 of article 5282c confidential. There is no basis to withhold the references under section 552.101.² Therefore, you must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/LMM/rho

Ref.: ID# 31553

Enclosures: Submitted documents

cc: Tommie E. Anderson, R.P.L.S.
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(w/o enclosures)

¹We note that in certain instances information subject to a confidentiality clause may be withheld, for example, by court order under section 552.107(2) or excepted from disclosure by constitutional or common law privacy under section 552.101. There is no court order here, nor is the information protected under the doctrines of common-law or constitutional privacy. *See discussion supra.*

²This was also the state of the law when the references at issue were submitted to the board in 1979. The Open Records Act was enacted in 1973, making information held by governmental bodies subject to public disclosure unless excepted by specific sections outlined in the act. Additionally, prior to 1979 when the references at issue were submitted, this office had already concluded that absent express statutory authority to agree to keep information confidential, information held by a governmental entity is subject to public disclosure pursuant to the Open Records Act despite a contractual confidentiality provision to the contrary. *See, e.g., Attorney General Opinion H-258 (1974); Open Records Decision No. 55A (1975).*